**IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL**

Court's Order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

**A.O. No. 541 of 2001**
**(Old No. 1217 of 1993)**

Date of decision :-14-7-2006

**A.F.R. (Approved for Reporting)**

~~Not approved for reporting~~

Date :-14/7/06 Initials of Judge

**Note :-** Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

**HIGH COURT OF UTTARANCHAL, AT NAINITAL**

**First Appeal from Order No. 541 of 2001**
{Old No.1217/1993}

New India Assurance Company Ltd.
Through its Senior Divisional Manager
Indra Bhawan, Civil Lines
Allahabad ……Appellant

Versus

1. Kamal Singh S/o Sri Narian Singh
   R/o Sukral Khat, Fartat Tehsil Chakrauta
   District Dehradun (Claimant)
2. Shiv Kumar Gupta
   S/o Sri Ram Chandra
   R/o 229 Ramnagar Lakhibagh
   Dehradun ……..Respondents

Sri Rajesh Joshi i/b for Sri T.A. Khan learned counsel for the appellant.
Sri Hari Mohan Bhatia learned counsel for the respondent.

**Hon'ble J. C. S. Rawat, J.**

**1.** This first appeal has been filed against the judgment and award dated 25.10.1993 passed by Sri Dherendra Kumar Singh, the then Workmen's Compensation Commissioner (hereinafter referred as 'Commissioner'), Garhwal Division, District Dehradun in W.C.A. No.17/1991 Kamal Singh Vs. Shiv Kumar Gupta & another, whereby the learned Commissioner has awarded a sum of Rs.98,311/- as compensation in favour of the claimant-Kamal Singh against the appellant-New India Assurance Company Ltd.

**2.** Brief facts of the case are that a claim petition was filed by Kamal Singh-respondent no.1(injured) against the Insurance Company and one-Shiv Kumar Gupta alleging therein that he was driver in the vehicle of the respondent no.2- Shiv Kumar Gupta. He sustained the

injuries when the said vehicle met with an accident during the course of his employment. The injured-Kamal Singh (claimant) was medically examined by the doctor, who gave a certificate of 15% permanent disability. It was further alleged that he was aged about 24 years at the time of accident and he was earning Rs.900/- per month from the job of driving.

**3.** The opposite parties filed their written statements and contested the case. The respondent no.2-Shiv Kumar Gupta, who is the employer, had stated that he was not liable to pay the compensation. He had admitted that the claimant was his employee and he had also admitted that the accident took place on the relevant date and time. He further stated that the vehicle in question was insured with the New Indian Assurance Company and therefore the insurance company was liable to pay the compensation. The company had denied the averments made in the claim petition. The company had stated that the employer had not informed about the accident and as such the Company is not liable to pay the compensation.

**4.** The learned Commissioner framed necessary issues in the case and ultimately, the Commissioner had awarded the compensation as mentioned above.

**5.** The injured-Kamal Singh had examined himself as PW1 in support of his case. He has narrated the incident that how he sustained the injuries. He further stated that he was in the employment at the relevant time. He also adduced the evidence of A. Nagarch, Senior Orthopedic Surgeon, Doon Hospital as PW2. Apart this, the documentary evidence was also filed. The claimant

had also filed the certificate of the Gram Pradhan and two medical certificates, one of which reveals that the disability of the claimant was assessed upto the extent of 15%. No evidence was adduced in rebuttal. The learned Commissioner came to the conclusion that the injured is not able to perform the job of driving due to the injuries sustained by him in an accident and such he was permanently disabled and as such the compensation was awarded.

**6.** The only substantial question of law involved in this case is that "*whether the compensation is to be granted taking into consideration the provisions of part 1 of the Ist schedule made in terms of section 2(1) and section 4(1) of the Workmen's Compensation Act."* Schedule 1 Part 2 clearly emphasizes the injuries, which can be termed as 'permanent disability'. The injuries, which had been sustained by the claimant, did not fall in any of the categories provided under that Chapter. Thus, it cannot be held that he was permanently disabled. The case of the appellant falls under section 4(c)(ii) of the Workmen Compensation Act, which is as follows:-

> *"(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner permanently caused by the injury,"*

**7.** Learned counsel for the respondent no.2 relied upon a decision of the Hon'ble Supreme Court in **Pratap Narain Singh Deo Vs. Srinnivas Sabata 1976(1)**

**SCC 289,** wherein the case of amputation of left arm from the elbow causing total disablement to perform the work of carpenter was discussed. It was contended in the present case that the claimant had sustained the injuries and he was not able to do the job of driving due to injuries sustained by him. As such, he is disabled as contemplated under section 2 within the definition of disability. The imputation itself comes within the purview of the schedule 1 part 2. Thus, the decision of **Pratap Narain Singh Deo** (supra) turned on its own facts, therefore, the principles therein cannot be extended to the present case.

**8.** Before the Amendment Act 22 of 1984, the law did not require that, the loss of earning capacity of the applicant workman should be assessed by a qualified medical practitioner. The Legislature in its wisdom thought it necessary and fit to make a provision, enabling the assessment of loss of earning capacity of the workman by a qualified medical practitioner and this amendment came into force w.e.f. 01$^{st}$ July, 1984. When the statute commands the Commissioner, who is the adjudicatory authority under the Act, to exercise power vested in him in a particular manner and subject to certain conditions statutorily laid, then the adjudicatory authority/Commissioner is statutorily bound to follow the same and if, there is any departure from the prescribed procedure or violation of the conditions, then it could be straightway stated that the Commissioner has committed an illegality. Even before the Amendment Act, 22 of 1984, the Commissioner had jurisdiction to compute the compensation payable to an injured employee. The only change brought about by the Amendment Act, 22 of 1984, providing for

assessment of loss of earning capacity by a qualified medical practitioner is an amendment regulating only the procedure to be followed by the Commissioner and it is not an amendment restricting or abridging the Commissioner power otherwise available to him under the provisions of the Act in the matter of determination of compensation payable to the workman under section 4 of the Act. The reference was made to the Full Bench decision of the Kerala High Court in **New India Assurance Co. Ltd. Vs. Sreedharan reported in 1995 A.C.J. 373 & 1995(1) T.A.C. 393.** Again, the matter for consideration came up before the Hon. Justice S.B. Sinha, the then A.C.J., Calcutta High Court in **New India Assurance Co. Ltd. Vs. Bishwanath Das 2001(1) T.A.C. p/117 (Cal.),** in which the claimant was a Khalasi in the vehicle of the employer and he sustained the injuries on his neck, both legs, hands and shoulders. The Khalasi was examined by the doctor, who assessed his injury as 100% as the victim was unfit for the job of Khalasi, but there was no certificate by a qualified medical practitioner about the assessment of loss of earning capacity of the workman. In that case, the Court has held that in absence of such certificate the disability should not be sustained to award the compensation and the judgment was set aside.

**9.** In the instant case, the claimant had not filed a certificate of loss of earning by a qualified medical practitioner. Thus, the case is liable to be remanded to the learned Commission.

**10.** For the reasons aforementioned, I am of opinion that the judgment under appeal cannot be sustained. It

is set aside accordingly. The appeal is allowed. The proceedings are remanded to the learned Commissioner with a direction to consider the claim of the claimant-injured afresh strictly in accordance with the provisions of the Act and the Rules framed thereunder after affording opportunity to the parties to lead additional or fresh evidence at an early date and preferably within a period of three months from the date of receipt of copy of this judgment.

**11.** It is made clear that if the claimant-injured has withdrawn the amount, the Commissioner would not proceed to recover against the claimant till the disposal of the claim application.

**(J.C.S. Rawat, J.)**

Dated 14.07.2006

LSR